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No. 90-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANR PIPELINE COMPANY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(EXXON CORPORATION, real party in interest),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE JOINT BRIEF *AMICI CURIAE* AND JOINT BRIEF *AMICI CURIAE* OF THE AMERICAN GAS ASSOCIATION AND THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE JOINT BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of the Supreme Court, the American Gas Association ("A.G.A.") and the Interstate Natural Gas Association of America ("INGAA") respectfully move for leave to file the attached brief as *amici curiae* in support of ANR Pipeline Company's ("ANR") petition for a writ of certiorari. The consent of counsel for ANR has been obtained. Counsel for respondent Exxon Corporation (real party in interest) has not consented.

A.G.A. is a national non-profit trade association representing the interests of its approximately 250 member companies involved in the distribution and transmission of natural gas throughout the United

States and Canada. A.G.A. distribution company members buy or take delivery of natural gas from interstate pipeline companies such as ANR for resale or transportation to approximately 160 million consumers.

INGAA is a non-profit national trade association whose membership includes virtually all of the major interstate natural gas pipeline companies operating in the United States. INGAA's United States members account for over 90 percent of all natural gas transported and sold for resale in interstate commerce.

As national organizations representing virtually all of the interstate pipeline companies and many other companies involved in the distribution of natural gas, A.G.A. and INGAA are especially cognizant of the predictable consequences of the rulings for which ANR seeks review.

The means chosen by the Federal Energy Regulatory Commission (the "Commission") to resolve the take-or-pay crisis that has afflicted the natural gas industry for the past several years is the voluntary settlement of those claims by producers and pipeline companies. The success of the Commission's settlement policy depends upon both the producer and the pipeline company having substantially equal bargaining power. Allowing producers access to the type of information which the lower courts have ordered ANR to produce in this case—confidential settlement agreements entered by ANR with other producers and self-critical analyses which ANR prepared and submitted to the Commission—would undermine pipeline companies' bargaining position, make settlement more difficult, and prolong the take-or-pay problem in the industry.

A.G.A. and INGAA believe that they are distinctly positioned to present the views of the industry.

For these reasons, A.G.A. and INGAA respectfully request that this Court grant this motion so that they may present their views in the attached brief.

Respectfully submitted,

/s/ John H. Cheatham, III

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JOINT BRIEF *AMICI CURIAE* OF THE AMERICAN GAS ASSOCIATION AND THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

The American Gas Association ("A.G.A.") and the Interstate Natural Gas Association of America ("INGAA") submit this joint brief *amici curiae* in support of the petition for a writ of certiorari filed by petitioner ANR Pipeline Company ("ANR").

INTEREST OF THE AMICI CURIAE

A.G.A. is a national non-profit trade association representing the interests of its approximately 250 member companies involved in the distribution and transmission of natural gas throughout the United States and Canada. A.G.A.'s members include inter-

state pipelines, such as ANR, and local natural gas distribution companies. Collectively, these companies serve consumers in all fifty states and account for 85 percent of the nation's natural gas utility sales. A.G.A. distribution company members buy or take delivery of natural gas from interstate pipeline companies such as ANR for resale or transportation to approximately 160 million consumers.

INGAA is a non-profit national trade association whose membership includes virtually all of the major interstate natural gas pipeline companies operating in the United States, as well as major Canadian interprovincial pipelines which are regulated by the National Energy Board of Canada. INGAA's United States members account for over 90 percent of all natural gas transported and sold for resale in interstate commerce.

For many years, both INGAA and A.G.A. have appeared in proceedings before the Federal Energy Regulatory Commission (the "Commission"), United States Courts of Appeals, and the United States Supreme Court when issues affecting the general interests of their members and of the natural gas industry have been involved.

SUMMARY OF THE ARGUMENT

The means chosen by the Commission to resolve the take-or-pay crisis that has afflicted the natural gas industry for the past several years is the voluntary settlement of those claims by producers and pipeline companies. The success of the Commission's settlement policy depends upon both the producer and the pipeline company having substantially equal bargaining power. Allowing producers access to the type

of information which the lower courts have ordered ANR to produce in this case—confidential settlement agreements entered by ANR with other producers and ANR's self-critical analyses which ANR prepared and submitted to the Federal Energy Regulatory Commission—would undermine pipeline companies' bargaining position, make settlement more difficult, and prolong the take-or-pay problem in the industry.

ARGUMENT

A.G.A. and INGAA request that this Court grant ANR's petition for a writ of certiorari. In its petition, ANR requests that the Court review orders of the courts below that would compel ANR to disclose to Exxon Corporation, a major natural gas producer, (i) the terms of confidential agreements to settle disputes under gas supply contracts between ANR and other producers, and (ii) ANR's self-critical analyses of its payment obligations under gas supply contracts with other producers, which ANR was compelled by a Commission order to prepare and file with the Commission. Disclosure to Exxon of these documents would not only damage consumers of natural gas but also frustrate federal regulatory policy.

This Court recently acknowledged that "take-or-pay" contracts have been a major cause of the severe distortions in natural gas markets over the last decade. *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 111 S. Ct. 615, 621, 627 (1991). This Court has also acknowledged the Commission's extensive, ongoing efforts to address the problems caused by take-or-pay contracts. *Id.* at 627-28.

The most significant aspect of those efforts is the Commission's reliance upon the success of the private negotiation and settlement of take-or-pay contract disputes between producers and interstate pipelines. "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500-H, 54 Fed. Reg. 52,344, 52,358 (Dec. 21, 1989) ("Order 500-H"); *see American Gas Ass'n v. FERC*, 912 F.2d 1496, 1508 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991). In fact, the Commission has recognized that the success of its efforts to correct market distortions depends heavily upon the ability of pipeline companies to negotiate settlements on a competitive basis with the producers. Order 500-H, 54 Fed. Reg. at 52,359. Accordingly, the Commission has expressly refused to take action that would disadvantage pipelines in the negotiation process.

Specifically, the Commission considered a request for disclosure of some of the very same information concerning individual producer/pipeline settlements and evaluative data that Exxon seeks to compel in this case. The Commission firmly rejected that request, stating:

> There is no doubt that these data and material submitted by the pipelines are sensitive commercial information. Disclosure will . . . cause the pipelines substantial competitive harm in that producers will know the terms of settlements that have already been executed. In addition, such disclosure will harm pipeline ratepayers and consumers because a lessening of the pipelines' bargaining power would result in less favorable settlements for

> the pipelines and the flowthrough of the attendant higher settlement costs to ratepayers and consumers.

"Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-059], Order Denying Release of Data, 50 FERC (CCH) ¶ 61,391 at 62,219 (Mar. 21, 1990). The United States Court of Appeals for the District of Columbia Circuit upheld the Commission's determination not to release the data. *American Gas Ass'n*, 912 F.2d at 1508 n.3.

The Commission, in an exercise of its expertise, thus refused to disclose some of the very same information and data Exxon seeks in this case.[1] The same reasons dictate that ANR should not be compelled to produce the agreements and information requested by Exxon. Such disclosure would thwart federal regulatory policy that relies on competitively bargained settlements of gas supply contract disputes between producers such as Exxon and pipelines such as ANR. It would be inconsistent with that policy to give producers an unfair bargaining advantage that would result in increased prices to consumers.

In this connection, interstate pipelines' costs of service, including the cost of gas supply, generally are included in the pipelines' rates to their customers under regulations and policies promulgated by the Commission. The Commission has determined that "there

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[1] Although no Commission order is at issue here, AGA and INGAA assert that "a presumption of validity" should be accorded to the "exercise of the Commission's expertise" in an analogous circumstance. *See Mobil Oil Corp. v. FPC*, 417 U.S. 283, 307 (1974).

should be an equitable sharing of take-or-pay costs among all segments of the industry . . . ." "Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol" [Federal Energy Regulatory Commission Docket No. RM87-34-000], Order No. 500, 52 Fed. Reg. 30,334, 30,342 (Aug. 7, 1987); *see also* "Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs," Order No. 528, FERC Docket No. RM91-2-000, 53 FERC (CCH) ¶ 61,163, at 61,596 (Nov. 1, 1990) ("The Commission reiterates its conviction that *all* segments of the industry must share the responsibility for paying for these transition costs."), *rehearing granted in part and denied in part*, Order No. 528-A, 54 FERC (CCH) ¶ 61,095 (Jan. 31, 1991).

To effectuate its policy of "equitable sharing," the Commission has adopted a policy providing for the apportionment of take-or-pay settlement costs between pipelines and their customers. Order No. 500, 52 Fed. Reg. at 30,342. Under this policy, interstate pipeline companies are entitled to pass through in their rates a portion of the cost incurred in settling take-or-pay claims with producers, thus requiring the pipelines' customers and consumers to share in the cost of resolving the take-or-pay crisis.[3]

Allowing producers access to the type of information that Exxon seeks here—confidential information regarding pipelines' take-or-pay settlements and agreements with other producers—gives those pro-

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[3] *See* Foster Natural Gas Report, No. 1811 at 17-21 (Feb. 7, 1991) (showing that, in most states, those take-or-pay charges not absorbed by pipelines flowed through to the ultimate natural gas consumers).

ducers an unfair advantage in their negotiations with the pipelines, to the disadvantage of the pipelines, the pipelines' customers, and consumers of natural gas. Such disclosure thus discriminates in favor of producers, and destroys the Commission's stated policy of enforcing an "equitable sharing" of take-or-pay costs among all segments of the industry.

CONCLUSION

If interstate pipelines are compelled to show producers their settlement agreements with other producers and to reveal their analyses of payment obligations under contracts with other producers, the pipelines will be severely disadvantaged in their negotiation of settlements with producers. The cost of settling contract disputes will therefore increase, causing an increase in the cost of gas to consumers. Requiring such disclosure discriminates in favor of producers and against pipelines and their customers, and frustrates established federal regulatory policy.

For these reasons, A.G.A. and INGAA respectfully request that ANR's petition for a writ of certiorari be granted.

Respectfully submitted,

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